

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

TIFFANY YIP, *et al.*,

Plaintiffs,

Case No. 2:21-cv-01254-ART-EJY

ORDER

V.

BANK OF AMERICA, N.A.,

Defendant.

A.H. HAMILTON, an individual, on behalf of himself and all others similarly situated.

Plaintiff.

1

BANK OF AMERICA, N.A.,

Defendant.

Case No. 2:22-cv-00374-ART-EJY

This litigation arises from a wave of transaction fraud that targeted Nevada’s public benefits programs during the Covid-19 pandemic. Numerous class and individual actions have been brought against Defendant Bank of America, N.A. (“BANA”) over its administration of Nevada’s electronic benefits payment system.

This Court ordered collective action *Yip v. Bank of America*, N.A., 2:21-cv-01254-ART-EJY (“*Yip*”), and putative class action *Hamilton v. Bank of America*, N.A., 2:22-cv-00374-ART-EJY (“*Hamilton*”), be partially consolidated for pretrial purposes, including the adjudication of pretrial motions to dismiss. (*Yip* ECF No. 40; *Hamilton* ECF No. 17.) Now pending before the Court are BANA’s motions to dismiss in each case. (*Yip* ECF No. 44; *Hamilton* ECF No. 22.) Also pending in *Yip* is Plaintiffs’ Motion for Leave to Submit Supplemental Authority in Support of Plaintiffs’ Opposition to Defendant’s Motion to Dismiss. (*Yip* ECF No. 58.) For the reasons stated, the Court will grant the motions to dismiss in part and deny them in part and grant Plaintiffs’ Motion for Leave to Submit Supplemental Authority.

1 **I. FACTUAL AND PROCEDURAL BACKGROUND**

2 The *Yip* Plaintiffs filed their collective action on July 1, 2021. (*Yip* ECF No. 1.) On December 22, 2021, this case was consolidated with another collective action, *Vance, et al. v. Bank of America, N.A.*, 2:21-cv-02149-RFB-BNW, pursuant to a stipulation by the plaintiffs in both cases and BANA. (ECF No. 25.) Plaintiffs filed a First Amended Complaint (“FAC”) with the additional parties on March 21, 2022. (*Yip* ECF No. 31 (“*Yip* FAC”).) The FAC lists 224 individual Plaintiffs. (*Id.*)

3 According to the FAC, Bank of America was contracted to be the exclusive provider of the Nevada Department of Employment, Training & Rehabilitation’s benefit programs, including unemployment insurance, disability insurance, paid family leave, pandemic unemployment assistance, and pandemic emergency unemployment compensation benefits (collectively “DETR benefits”). (*Id.* at ¶ 16.) When bidding for the contract, Bank of America allegedly offered to provide DETR benefits recipients with debit cards for the electronic distribution of DETR benefits and made certain representations about Bank of America’s abilities to protect benefits recipients from fraud and to provide efficient and widely accessible customer service. (*Id.* at ¶¶ 13-21.) Notably, Bank of America allegedly promised that debit cardholders would receive Bank of America’s “Zero-Liability coverage” for cases of fraud. (*Id.* at ¶ 14.)

4 Bank of America allegedly issued debit cards for DETR benefits which utilized only the magnetic stripe technology. Plaintiffs allege that the magnetic stripe technology is weaker and more susceptible to fraud than the now-industry standard chip technology, and that its use led to widespread unauthorized and fraudulent transactions resulting in the loss of significant funds to debit cardholder accounts. (*Id.* at ¶¶ 27-38, 42-47.) Bank of America allegedly failed to adequately respond to these fraud claims, including, *inter alia*, by making fraud difficult to report through long wait times and dropped calls, by denying fraud claims without investigation or explanation, by automatically and indefinitely

1 freezing accounts when cardholders reported unauthorized transactions, and by
 2 making assistance with these issues difficult to obtain. (*Id.* at ¶¶ 48-66.) The FAC
 3 describes the harms experienced by each of the 224 individual plaintiffs,
 4 including home evictions due to inability to pay rent for lack of access to their
 5 DETR benefits. (*Id.* at ¶¶ 67-290.)

6 The FAC includes twelve causes of action: (1) violations of the Electronic
 7 Funds Transfer Act (“EFTA”); (2) Due Process claims under the Fourteenth
 8 Amendment of the U.S. Constitution; (3) Due Process claims under the Nevada
 9 Due Process Clause; (4) violations of the Nevada Deceptive Trade Practices Act;
 10 (5) negligence and negligence per se; (6) breach of contract; (7) breach of implied
 11 contract; (8) breach of implied covenant of good faith and fair dealing; (9) breach
 12 of fiduciary duty; (10) breach of contract as third-party beneficiaries; (11) breach
 13 of implied covenant of good faith and fair dealing as third-party beneficiaries; and
 14 (12) unjust enrichment and money had and received.

15 Plaintiff A.M. Hamilton filed his putative class action complaint on March
 16 1, 2022. (*Hamilton* ECF No. 1.) Following this Court’s consolidation order,
 17 Hamilton filed an amended complaint that added three named Plaintiffs and
 18 additional allegations. (*Hamilton* ECF No. 19 (“*Hamilton* FAC”).) The *Hamilton* FAC
 19 begins by describing Bank of America’s contract with DETR and how the Covid-
 20 19 pandemic placed a massive strain on the unemployment system. (*Hamilton*
 21 FAC at ¶¶ 13-24.) The *Hamilton* FAC then sets forth allegations concerning Bank
 22 of America’s policies and actions after Bank of America ceased its role
 23 administering DETR benefits in June 2021. (*Id.* at ¶¶ 25-29.) The *Hamilton* FAC
 24 also includes allegations related to federal investigations into BANA’s
 25 administration of Nevada and other states’ unemployment programs. (*Id.* at ¶¶
 26 30-43.)

27 Hamilton describes how he applied for unemployment in 2020, received a
 28 debit card from Bank of America, and “had no problem with the program” before

1 he accepted a job offer and destroyed his debit card. (*Id.* at ¶¶ 46-49.) He then
 2 allegedly received a Form 1099 from DETR showing that he had been paid \$3,000
 3 by DETR in January of 2022. (*Id.* at ¶ 50.) Bank of America failed to notify
 4 Hamilton of the payment despite having his contact information. (*Id.* at ¶ 51.)
 5 After Hamilton was unable to access his Bank of America account, he filed a fraud
 6 claim with DETR, but never heard back from DETR or Bank of America and
 7 cannot access his account. (*Id.* at ¶¶ 52-59.)

8 Plaintiff Kevin Johnson alleges that unemployment benefits paid to his
 9 BANA debit card were stolen by fraudsters, that he reported this fraud to BANA,
 10 and that BANA locked his account in response, preventing him from receiving his
 11 unemployment benefits. (*Id.* at ¶¶ 62-79.) After spending many hours on the
 12 phone with BANA and DETR, Johnson managed to get most of the fraudulent
 13 charges refunded, but not all of them. (*Id.*)

14 Plaintiff Kristin Jones alleges that he never received over \$15,000 in
 15 benefits that DETR paid to BANA on his behalf. (*Id.* at ¶¶ 80-91.) Jones alleges
 16 that he disputed the amount of benefits shown on his Form 1099 with BANA and
 17 the State of Nevada, but the matter was deemed closed with no resolution on the
 18 missing funds. (*Id.*)

19 Plaintiff Nikita White alleges that, after her application for unemployment
 20 benefits was approved, she never received her BANA debit card. (*Id.* at ¶¶ 92-104.)
 21 After reporting this to BANA, BANA cancelled the card she was purportedly issued
 22 and sent her a new card. (*Id.*) After receiving her new card, she looked at her
 23 statements online and saw that there were fraudulent charges and missing
 24 benefits. (*Id.*) She alleges that she disputed the fraudulent charges with BANA.
 25 (*Id.*) She also alleges that she received far less in benefits than what the State of
 26 Nevada reported on her tax forms and that she has been unsuccessful in her
 27 attempts to dispute the receipt of the funds. (*Id.*)

28 Hamilton, Jones, and White all allege that they either have paid or will have

1 to pay taxes for income they never received, and that BANA continues to hold.
 2 (*Id.* ¶¶ 61, 90, 104.)

3 The *Hamilton* FAC sets forth two proposed classes: the Zero Liability Class
 4 and the Remainder Funds Class. (*Id.* at ¶ 105.) The Zero Liability Class is defined
 5 as “All Nevada unemployment insurance debit card account customers of Bank
 6 of America who suffered a loss based upon an unauthorized transaction.” (*Id.* at
 7 ¶ 106.) The Remainder Funds Class is defined as “All Nevada unemployment
 8 insurance debit card account customers of Bank of America who had funds
 9 remaining in their account as of the date of filing of the Class Action Complaint.”
 10 (*Id.* at ¶ 107.) The *Hamilton* FAC provides examples of stories posted on internet
 11 forums by debit cardholders, including examples where accounts were frozen by
 12 Bank of America after fraud was reported. (*Id.* at ¶ 112.) The *Hamilton* FAC brings
 13 five claims: (1) breach of contract for the Zero Liability Class; (2) breach of
 14 contract for the Remainder Funds Class; (3) unjust enrichment and money had
 15 and received for both classes; (4) violations of the EFTA for the Zero Liability
 16 Class; and (5) violations of the Nevada Deceptive Trade Practices Act for both
 17 classes.

18 After partial consolidation of *Yip* and *Hamilton* for pretrial purposes, BANA
 19 moved to dismiss both the *Yip* FAC and the *Hamilton* FAC. (*Yip* ECF No. 44;
 20 *Hamilton* ECF No. 22.) Plaintiffs responded to each of the motions to dismiss, (*Yip*
 21 ECF No. 45; *Hamilton* ECF No. 27), and BANA replied (*Yip* ECF No. 47; *Hamilton*
 22 ECF No. 28). Since briefing concluded, both parties have submitted various
 23 notices of supplemental authority and responses to those notices. (*Yip* ECF Nos.
 24 48, 49, 50, 51, 52, 53; *Hamilton* ECF Nos. 29, 30, 31, 32, 33, 34.) Also pending
 25 in *Yip* is Plaintiffs’ Motion for Leave to Submit Supplemental Authority in Support
 26 of Plaintiffs’ Opposition to Defendant’s Motion to Dismiss. (*Yip* ECF No. 58.)

27 **II. DISCUSSION**

28 Defendant moves to dismiss both the *Yip* and *Hamilton* Plaintiffs’ claims

1 under Fed. R. Civ. P. 12(b)(6). A court may dismiss a plaintiff's complaint for
 2 "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).
 3 A properly pleaded complaint must provide "a short and plain statement of the
 4 claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell*
 5 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not
 6 require detailed factual allegations, it demands more than "labels and
 7 conclusions" or a "formulaic recitation of the elements of a cause of action."
 8 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). All
 9 factual allegations set forth in the complaint are taken as true and construed in
 10 the light most favorable to the plaintiff. *Lee v. City of Los Angeles*, 250 F.3d 668,
 11 679 (9th Cir. 2001). To survive a motion to dismiss, a complaint must contain
 12 sufficient factual matter to "state a claim to relief that is plausible on its face."
 13 *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). But even a facially
 14 plausible claim may be dismissed under Fed. R. Civ. P. 12(b)(6) for "lack of a
 15 cognizable legal theory." *Solida v. McKelvey*, 820 F.3d 1090, 1096 (9th Cir. 2016).
 16 Thus, a claim must be both factually plausible and legally cognizable to survive
 17 dismissal.

18 The Court will begin its analysis with claims brought by both the *Yip* and
 19 *Hamilton* Plaintiffs before analyzing the claims brought only by the *Yip* Plaintiffs.

20 **A. The Shared Claims**

21 **1. EFTA Violations**

22 The *Yip* Plaintiffs, the named Plaintiffs in *Hamilton*, and the proposed "Zero
 23 Liability Class" in *Hamilton* all allege that BANA violated the Electronic Funds
 24 Transfer Act ("EFTA"), 15 U.S.C. §§ 1963 *et seq.*, and Regulation E ("Reg E"), 12
 25 C.F.R. §§ 1005.1 *et seq.*, by failing to comply with the required error resolution
 26 procedure.

27 The EFTA "establish[es] the rights, liabilities, and responsibilities of
 28 participants in electronic fund and remittance transfer systems." 15 U.S.C. §

1693(b). The EFTA and its implementing regulation, Reg E, regulate electronic fund transfers which directly affect consumer accounts. § 1963(a)(7). Under § 1693f(a), when a consumer notifies a financial institution that the consumer believes an “error” has occurred in their account, the “financial institution shall investigate the alleged error, determine whether an error has occurred, and report or mail the results of such investigation and determination to the consumer within ten business days.” § 1693f(a). The statute mandates specific steps the financial institution must take depending on the results of its investigation, as well as the time frames in which the steps must be taken. § 1693f(b)–(d).

To trigger a financial institution’s obligations under the EFTA, consumers must identify a qualifying error. 15 U.S.C. § 1693f(a); 12 C.F.R. § 1005.11(b). Qualifying errors include:

- (i) An unauthorized electronic fund transfer;
- (ii) An incorrect electronic fund transfer to or from the consumer's account;
- (iii) The omission of an electronic fund transfer from a periodic statement;
- (iv) A computational or bookkeeping error made by the financial institution relating to an electronic fund transfer;
- (v) The consumer's receipt of an incorrect amount of money from an electronic terminal;
- (vi) An electronic fund transfer not identified in accordance with § 1005.9 or § 1005.10(a); or
- (vii) The consumer's request for documentation required by § 1005.9 or § 1005.10(a) or for additional information or clarification concerning an electronic fund transfer, including a request the consumer makes to determine whether an error exists under paragraphs (a)(1)(i) through (vi) of this section.

12 C.F.R. § 1005.11(a)(1)(i)–(vii); *see also* 15 U.S.C. § 1693f(f)(1)–(7).

Plaintiffs generally allege that they experienced qualifying errors, notified BANA of such errors, and that BANA failed to comply with the EFTA’s requirements following notice.

BANA argues for dismissal of certain claims based on a variety of purported failures in the pleadings. First, BANA argues that some Plaintiffs’ claims were not

1 filed within the statute of limitations. Second, BANA argues that some Plaintiffs
 2 failed to allege a qualifying error as required by the EFTA. Third, BANA argues
 3 that some Plaintiffs did not provide sufficient notice to trigger its obligations
 4 under the EFTA. Fourth, BANA contends that even if Plaintiffs' claims were
 5 sufficiently pled in all other respects, they do not plausibly allege that BANA failed
 6 to meet its obligations under the EFTA. The Court will address each of these
 7 arguments in turn.

8 **i. Statute of Limitations**

9 Actions brought under the EFTA must commence "within one year from the
 10 date of the occurrence of the violation." 15 U.S.C. § 1693m(g). In its Motion to
 11 Dismiss the *Yip* FAC, BANA identified seventy-one Plaintiffs whose EFTA claims
 12 are allegedly time-barred. In its Motion to Dismiss the *Hamilton* FAC, BANA
 13 argued that Plaintiffs Johnson and Jones brought time-barred claims.

14 The *Yip* Plaintiffs argue that the statute of limitations is not grounds for
 15 dismissal at this stage of the litigation because many Plaintiffs' harms are
 16 ongoing. After discovery, the *Yip* Plaintiffs say they may be able to show
 17 exceptions to the statute of limitations, like equitable tolling.

18 On this point, the Court agrees with the *Yip* Plaintiffs and finds that
 19 dismissal for the statute of limitations is inappropriate at this stage of litigation
 20 because further discovery could plausibly affect the Court's determination of the
 21 issue. The Court will therefore deny BANA's Motion to Dismiss the *Yip* FAC on
 22 this ground. This denial is without prejudice, and BANA will be permitted to argue
 23 that the *Yip* Plaintiffs' claims are time-barred in future pretrial motions.

24 The *Hamilton* Plaintiffs counter BANA's argument for dismissal by arguing
 25 that in a Fed. R. Civ. P. 23 class action, "the statute of limitations for individual
 26 claims is suspended for all purported members of the class until a formal decision
 27 on class certification has been made." *Bonilla v. Las Vegas Cigar Co.*, 61 F. Supp.
 28 2d 1129, 1135 (D. Nev. 1999). Thus, according to Plaintiffs, when Hamilton filed

1 his original complaint asserting an EFTA claim on March 1, 2022, that tolled the
 2 statute of limitations regarding the EFTA claim for all purported members of the
 3 class, including Johnson and Jones.

4 BANA contends that because Johnson and Jones are named Plaintiffs in
 5 the FAC, Fed. R. Civ. P. 15's relation-back doctrine governs. Here, the Court finds
 6 that Plaintiffs prevail under either theory. A claim brought by a new plaintiff
 7 relates back under Rule 15 only if (1) the original complaint gives "the defendant
 8 adequate notice of the claims of the newly proposed plaintiff"; (2) relation back
 9 does not "unfairly prejudice the defendant"; and (3) there is "an identity of
 10 interests between the original and newly proposed plaintiff." *Immigrant*
 11 *Assistance Project of the Los Angeles Cnty. Fed'n of Labor (AFL-CIO) v. INS*, 306
 12 F.3d 842, 857 (9th Cir. 2002). Here, all requirements are met.

13 First, Hamilton's original complaint put BANA on notice of alleged EFTA
 14 violations in BANA's administration of DETR benefits. While the factual details
 15 differ in the allegations from Hamilton and those from Johnson and Jones, the
 16 Court finds that they are sufficiently similar to give BANA adequate notice.
 17 Johnson and Jones, like Hamilton, allege that BANA mishandled DETR funds in
 18 violation of the EFTA. In addition, because Johnson and Jones are "similarly
 19 situated" to Hamilton, adding the new Plaintiffs will "not cause [BANA] any
 20 prejudice in the present case." *Id.* at 858. Finally, when "the original individual
 21 plaintiff[] and the current individual plaintiffs are 'similarly situated,' the identity-
 22 of-interest requirement of Rule 15(c) is also met." *Id.* The Court therefore finds
 23 that Johnson and Jones' claims relate back to Hamilton's claim. Thus, BANA's
 24 Motion to Dismiss Johnson and Jones' claims as time-barred is denied.

25 **ii. Qualifying Error**

26 Next, BANA argues that both *Yip* and *Hamilton* Plaintiffs failed to allege a
 27 qualifying error. For example, in *Yip* BANA argues that many Plaintiffs
 28 insufficiently alleged that they experience "fraud" or an unspecified "error"

1 without specifying whether those errors involved unauthorized transactions.
 2 BANA also argues that the *Yip* Plaintiffs who point to an account freeze as the
 3 basis for their EFTA claim fail to state a qualifying error. Similarly, BANA argues
 4 that Hamilton and Jones do not allege that they experienced unauthorized
 5 transactions. BANA also contends that White failed to state an EFTA claim based
 6 on her dispute with BANA concerning funds that she allegedly did not receive.

7 As outlined above, a qualifying error is defined in the EFTA and its
 8 implementing regulations. *See* 12 C.F.R. § 1005.11(a)(1)(i)-(vii); 15 U.S.C. §
 9 1693f(f)(1)-(7). Qualifying errors include: “unauthorized electronic fund
 10 transfer[s],” 12 C.F.R. § 1005.11(a)(1)(i); “[t]he omission of an electronic fund
 11 transfer from a periodic statement,” § 1005.11(a)(1)(iii); “[t]he consumer’s request
 12 for documentation required by . . . § 1005.10(a) or for additional information or
 13 clarification concerning an electronic fund transfer, including a request the
 14 consumer makes to determine whether an error exists,” § 1005.11(a)(1)(vii).
 15 Under the EFTA, an “unauthorized electronic transfer” is defined as “an electronic
 16 fund transfer from a consumer’s account initiated by a person other than the
 17 consumer without actual authority to initiate such transfer and from which the
 18 consumer receives no benefit.” 15 U.S.C. § 1693a(12).

19 On this issue, the Court finds the decision in *In re Bank of Am. California*
 20 *Unemployment Benefits Litig.*, 674 F. Supp. 3d 884 (S.D. Cal. 2023) instructive.
 21 In that case, determining EFTA claims on similar facts, the district court held
 22 that “[a] bare allegation that fraud occurred and was subsequently reported to
 23 the financial institution is insufficient to support an inference that the consumer
 24 reported a qualifying error.” *Id.* at 908 (internal quotation marks omitted).
 25 “Individual Plaintiffs who allege they ‘experienced fraud on [their] account[s]’ and
 26 reported the fraud to BANA, but didn’t report a qualifying error, therefore haven’t
 27 stated claims under the EFTA.” *Id.*

28 But allegations that a consumer: “(1) identified a fraudulent or

1 unauthorized transaction or withdrawal (including by looking at their account or
 2 transaction history);” and “(2) reported ‘fraud’ to the financial institution” are
 3 sufficient “to support the reasonable inference that the consumer reported an
 4 unauthorized transaction or withdrawal (both of which qualify as errors within
 5 the meaning of the EFTA).” *Id.* at 909.

6 Finally, while an account freeze is not an error covered by EFTA, Plaintiffs
 7 may allege a qualifying error related to an account freeze if they request
 8 “additional information to determine whether there was an incorrect or omitted .
 9 . . . benefits transfer into the account.” *Id.* A request for “additional information or
 10 clarification concerning an electronic fund transfer, including a request [made]
 11 to determine whether an error exists,” is a qualifying error. *See* 12 C.F.R. §
 12 1005.11(a)(1)(vii); *see also* 15 U.S.C. § 1693f(f)(6).

13 Under these standards, some *Hamilton* Plaintiffs have failed to state an
 14 EFTA claim. For example, Hamilton fails to allege a qualifying error. The *Hamilton*
 15 FAC says that once Hamilton found employment, he destroyed his BANA card.
 16 Then, he received a 1099 from DETR that showed that he had been paid \$3,000
 17 by DETR after he found employment. Hamilton alleges he never received the
 18 funds and was never notified about them. But because he did not have access to
 19 his BANA account when he received the 1099, Hamilton was unable to identify a
 20 fraudulent or unauthorized transaction or withdrawal. Thus, he did not identify
 21 a qualifying error. Additionally, the FAC does not include any allegations that
 22 Hamilton contacted BANA and requested information. Thus, Hamilton’s claim is
 23 dismissed with leave to amend for failure to state a qualifying error.

24 Similarly, Jones also fails to identify an unauthorized transaction in the
 25 FAC. Jones’ allegations are based on differences between the funds he received
 26 on his BANA debit card and the benefits DETR says it paid him. This discrepancy
 27 alone does not allege a qualifying error. But, unlike Hamilton, Jones alleges that
 28 he contacted BANA and disputed the amount. The Court finds this allegation

1 sufficient to allege a qualifying error based on a request for additional information
 2 to determine whether there was an incorrect or omitted benefits transfer into the
 3 account. *See* 12 C.F.R. § 1005.11(a)(1)(vii); *see also* 15 U.S.C. § 1693f(f)(6). The
 4 Court therefore denies BANA’s Motion to Dismiss Jones’ claim for failure to allege
 5 a qualifying error.

6 Johnson clearly alleges unauthorized transactions, so his claim will not be
 7 dismissed for failure to allege a qualifying error. (*Hamilton* FAC at ¶ 65-67.)

8 White also clearly alleges unauthorized transactions, so her claim will not
 9 be dismissed for failure to allege a qualifying error. (*Hamilton* FAC at ¶ 99-100.)

10 To the extent that White alleges a separate EFTA claim based on benefits
 11 that were missing from her BANA account, she fails to allege a qualifying error
 12 because that claim does not identify a fraudulent or unauthorized transaction or
 13 withdrawal. (*Hamilton* FAC at ¶ 98.) White’s allegations about her disputes with
 14 BANA also do not state that she requested additional information to determine
 15 whether there was an incorrect or omitted benefits transfer into the account, only
 16 that she reported fraudulent charges. (*Hamilton* FAC at ¶ 100.) Thus, White’s
 17 separate EFTA claim based on missing benefits is dismissed with leave to amend
 18 for failure to allege a qualifying error.

19 The Court also dismisses with leave to amend all EFTA claims of *Yip*
 20 Plaintiffs who fail to allege a qualifying error, consistent with the standards and
 21 analysis set forth in this Order. The *Yip* Plaintiffs may either file a second
 22 amended complaint that remedies the deficient claims and removes Plaintiffs who
 23 cannot allege a qualifying error or file a status report with the Court identifying
 24 which Plaintiffs in the *Yip* FAC have alleged a qualifying error, consistent with
 25 this Order.

26 **iii. Sufficient Notice**

27 Next, BANA argues that both *Yip* and *Hamilton* Plaintiffs failed to provide
 28 sufficient notice to BANA to trigger BANA’s obligations under the EFTA. To trigger

1 a financial institution's obligations under the EFTA, a consumer's notice must
 2 “[i]ndicate[] why the consumer believes an error exists and include[] to the extent
 3 possible the type, date, and amount of the error.” 12 C.F.R. §
 4 1005.11(b)(1)(iii); *see also* 15 U.S.C. § 1693f(a)(3). Requests for additional
 5 information or documentation need not include the amount of the error. 12
 6 C.F.R. § 1005.11(b)(1)(iii). In addition, the notice must “enable[] the institution to
 7 identify the consumer's name and account number.” 12 C.F.R. § 1005.11(b)(1)(ii).

8 BANA says all *Yip* Plaintiffs failed to allege that they provided sufficient
 9 notice. Specifically, BANA argues that the *Yip* Plaintiffs failed to make any
 10 allegations that they provided BANA with an explanation of why they believed an
 11 error existed or the amount of the error. BANA makes the same argument as to
 12 all *Hamilton* Plaintiffs, and BANA specifically argues that Johnson's allegation
 13 that he “reported the fraud,” (*Hamilton* FAC ¶ 67), to BANA is insufficient to state
 14 a claim under the EFTA. According to BANA, general allegations that Plaintiffs
 15 reported fraud are insufficient.

16 BANA is correct that Plaintiffs must allege they provided notice to BANA of
 17 any qualifying error in order to maintain an action under the EFTA. But BANA
 18 overstates the degree of specificity required to survive a Fed. R. Civ. P. 12(b)(6)
 19 motion to dismiss. “Factual allegations sufficient to support a plausible inference
 20 are sufficient to state a claim under the Federal Rules.” *In re Bank of Am.*
 21 *California Unemployment Benefits Litig.*, 674 F. Supp. 3d at 911. So long as
 22 Plaintiffs allege notice that could support a plausible inference that they provided
 23 BANA with the statutorily required information, their claims will not be
 24 dismissed.

25 For example, Hamilton failed to plausibly allege that he gave BANA
 26 sufficient notice of a qualifying error. In fact, nowhere in the *Hamilton* FAC does
 27 Hamilton allege that he notified BANA of any fraud, error, or unauthorized
 28 transaction. Hamilton's claim is therefore dismissed with leave to amend.

13 Jones alleges that he disputed the amount of his error with BANA.
14 (*Hamilton* FAC ¶ 86.) He also provides allegations about why he believed an error
15 existed. (*Hamilton* FAC ¶¶ 84-85.) Jones has alleged sufficient notice to maintain
16 a claim under the EFTA.

17 Similarly, White alleges that she disputed specific fraudulent charges with
18 BANA, and her allegations include specific amounts. (*Hamilton* FAC ¶¶ 99-100.)
19 White has therefore alleged sufficient notice for her EFTA claim related to the
20 fraudulent charges. On the other hand, her allegation concerning funds missing
21 from her account fails to allege notice to BANA. She merely says that she
22 “continues to unsuccessfully dispute the receipt of these funds. (*Hamilton* FAC ¶
23 103.) The Court cannot determine, based on these allegations, if she is disputing
24 receipt of the funds with DETR or BANA. Thus, White’s EFTA claim related to
25 benefits missing from her account is dismissed with leave to amend.

26 As above, the Court also dismisses with leave to amend all EFTA claims of
27 *Yip* Plaintiffs who fail to allege sufficient notice, consistent with the standards
28 and analysis set forth in this Order. The *Yip* Plaintiffs may either file a second

1 amended complaint that remedies the deficient claims and removes Plaintiffs who
 2 cannot allege sufficient notice or file a status report with the Court identifying
 3 which Plaintiffs in the *Yip* FAC have alleged sufficient notice, consistent with this
 4 Order.

5 **iv. BANA's Obligations under the EFTA**

6 Finally, BANA argues that even if the *Yip* and *Hamilton* Plaintiffs succeed
 7 in establishing all other elements of their EFTA claims, they have failed to
 8 plausibly allege that BANA's conduct violated the EFTA.

9 The *Yip* and *Hamilton* Plaintiffs allege a variety of EFTA violations by BANA,
 10 (*Yip* FAC ¶ 294; *Hamilton* FAC ¶¶ 138-139), all tied to specific statutory and
 11 regulatory provisions, *see* 15 U.S.C. § 1693f(a)-(d). Most relevant to this motion
 12 are allegations from both sets of Plaintiffs that BANA failed to conduct adequate
 13 investigations of Plaintiffs' claims of error. *See* 15 U.S.C. § 1693f(a)-(d) (BANA's
 14 obligations under the EFTA, after receiving notice of a qualifying error, are all
 15 dependent on the result of BANA's investigation of the alleged error).

16 The EFTA requires that a financial institution investigate any qualifying
 17 error reported by the consumer within ten business days of receiving notice of
 18 such error. 15 U.S.C. § 1693f(a). Reg E provides that "a financial institution's
 19 review of its own records regarding an alleged error" satisfies the EFTA's
 20 investigation requirement if: "(i) The alleged error concerns a transfer to or from
 21 a third party; and (ii) There is no agreement between the institution and the third
 22 party for the type of electronic fund transfer involved." 12 C.F.R. § 1005.11(c)(4);
 23 *see also* 12 C.F.R. § 1005, Supp. I at 11(c)(4) (Official Interpretation of §
 24 1005.11(c)(4)) ("When there is no agreement between the institution and the third
 25 party for the type of [electronic fund transfer] involved, the financial institution
 26 must review any relevant information within the institution's own records for the
 27 particular account to resolve the consumer's claim."). Thus, the EFTA "requires
 28 that any investigation under the statute include a reasonable review of the

1 financial institution's own records." *In re Bank of Am. California Unemployment*
 2 *Benefits Litig.*, 674 F. Supp. 3d at 912 (internal quotation marks omitted).

3 At this stage of the litigation, "factual allegations set forth in the complaint
 4 are taken as true and construed in the light most favorable to the plaintiff. *Lee*,
 5 250 F.3d at 679. Applying this principle to Plaintiffs' allegations, "it is reasonable
 6 to infer that BANA's records reflect the unauthorized nature of the reported
 7 transactions and that, if reviewed, those records would have resulted in different
 8 outcomes." *In re Bank of Am. California Unemployment Benefits Litig.*, 674 F.
 9 Supp. 3d at 912. Thus, if a Plaintiff in this action alleged that they provided BANA
 10 with notice of a qualifying error, and that in response BANA's investigation was
 11 inadequate, their claims will not be dismissed. Here, adequate investigation of a
 12 noticed qualifying error would include review of BANA's records, which would
 13 provide information about the reported error. Based on the allegations, Plaintiffs'
 14 have plausibly alleged that BANA failed to review its own records, which violates
 15 the EFTA.

16 Similarly, Plaintiffs who allege a qualifying error based on requests "for
 17 additional information or clarification concerning an electronic fund transfer,
 18 including a request the consumer makes to determine whether an error exists"
 19 need only allege that they requested the information, and that BANA did not
 20 provide the requested information to show a violation of the EFTA. 12 C.F.R. §
 21 1005.11(a)(1)(vii).

22 In *Hamilton*, Hamilton failed to allege any notice to BANA which would have
 23 triggered its obligations under the EFTA. Thus, Hamilton has not alleged any
 24 violation of the EFTA by BANA, so his claim is dismissed with leave to amend.

25 Johnson does not specifically allege that BANA failed to investigate the
 26 errors he reported. But Johnson does allege that BANA refused to refund
 27 fraudulent charges. (*Hamilton* FAC ¶ 74.) This allegation is sufficient to support
 28 the inference that BANA failed to review its records in its investigation of

1 Johnson's alleged error. Johnson has therefore plausibly alleged that BANA
 2 violated the EFTA, so his claim will not be dismissed.

3 Similarly, Jones alleges that he disputed the amount of funds he was paid
 4 with BANA, and that his dispute was closed with no resolution. (*Hamilton* FAC ¶
 5 86-88.) This allegation is sufficient to support the inference that BANA failed to
 6 review its records in its investigation of Jones' alleged error. Jones has therefore
 7 plausibly alleged that BANA violated the EFTA, so his claim will not be dismissed.

8 Finally, White alleges that she disputed fraudulent charges and the amount
 9 of benefits she received with BANA, and that she continues to unsuccessfully
 10 dispute the receipt of benefits. This allegation is sufficient to support the
 11 inference that BANA failed to review its records in its investigation of White's
 12 alleged error. White has therefore plausibly alleged that BANA violated the EFTA,
 13 so her claim will not be dismissed.

14 Here, the Court will deny dismissal of all *Yip* Plaintiffs who plausibly allege
 15 that BANA failed to review its records in response to notice of a qualifying error.
 16 In addition, the Court will deny dismissal of all *Yip* Plaintiffs who plausibly allege
 17 that BANA failed to provide information in response to requests for additional
 18 information or clarification concerning an electronic fund transfer, including a
 19 request the consumer makes to determine whether an error exists. The *Yip*
 20 Plaintiffs may either file a second amended complaint that remedies the deficient
 21 claims and removes Plaintiffs who cannot allege that BANA violated the EFTA or
 22 file a status report with the Court identifying which Plaintiffs in the *Yip* FAC have
 23 alleged that BANA violated the EFTA, consistent with this Order.

24 **2. Breach of Contract**

25 The *Hamilton* FAC alleges breach of the Account Agreement with BANA
 26 based on two theories. The first relates to the "Zero Liability" class. Under the
 27 first theory, Plaintiffs assert that BANA breached Section 9 of the Account
 28 Agreement, which states that Cardholders "may" be reimbursed for certain

1 “unauthorized transactions,” provided the Cardholders give timely notice with
 2 sufficient information to commence an investigation into the purported
 3 unauthorized transaction (the “Zero Liability Policy”). (*Hamilton* FAC ¶¶ 120-21;
 4 Ex. 5 §§ 9, 11.)

5 “Nevada law requires the plaintiff in a breach of contract action to show (1)
 6 the existence of a valid contract (2) a breach by the defendant, and (3) damage as
 7 a result of the breach.” *Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 919-920
 8 (D. Nev. 2006) (citing *Richardson v. Jones*, 1 Nev. 405, 405 (Nev.1865)). No party
 9 disputes the existence of a valid contract.

10 There are important differences in the Zero Liability Policy and the
 11 requirements of the EFTA. First, the Zero Liability Policy clearly only applies to
 12 unauthorized transactions. (*Hamilton* FAC, Ex. 5 § 9.) Second, while the
 13 requirements for timely notice closely tracks the EFTA’s notice period, notice
 14 under the Account Agreement must include why they believe an error occurred
 15 and the dollar amount involved, which is slightly more restrictive than the EFTA.
 16 (*Hamilton* FAC, Ex. 5 § 11.) Third, BANA has significantly more flexibility in
 17 investigating errors under the Account Agreement than it does under the EFTA.
 18 Section 9 provides that BANA’s “Zero Liability” policy doesn’t apply to
 19 transactions that aren’t considered “unauthorized,” and allows BANA to
 20 determine a transaction is “unauthorized” when it “conclude[s] that the facts and
 21 circumstances do not reasonably support a claim of unauthorized use.” (*Hamilton*
 22 FAC, Ex. 5 § 9.) Similarly, Section 11 provides BANA great flexibility in
 23 investigating allegations of error. To perform under Section 11, all BANA must do
 24 is “determine whether an error occurred.” (*Hamilton* FAC, Ex. 5 § 11.)

25 Under the terms of the Zero Liability Policy, no *Hamilton* Plaintiff alleges
 26 breach. *Hamilton* and *Jones*, for example fail to allege unauthorized transactions.
 27 *White* and *Johnson*, on the other hand, both allege unauthorized transactions.
 28 Read liberally, the Court is also satisfied that their allegations allege timely and

1 sufficient notice, including the dollar amount involved. But neither White nor
 2 Johnson adequately allege that BANA failed to reach the conclusion required by
 3 Section 9 or failed to investigate under Section 11. Thus, White and Johnson
 4 have failed to allege breach of the Account Agreement based on Sections 9 and
 5 11. The claims of all *Hamilton* Plaintiffs for breach of the Zero Liability Policy in
 6 the Account Agreement are therefore dismissed with leave to amend.

7 The second theory relates to the “Remainder Funds” class. Under this
 8 theory, Plaintiffs allege that BANA failed to release the funds in their accounts as
 9 required by the Account Agreement. Plaintiffs identify three provisions that BANA
 10 purportedly breached: (1) the Zero Liability Policy (*Hamilton* FAC, Ex. 5 § 9); (2) a
 11 provision in Section 16 governing BANA’s closure of an account, which provides
 12 that the cardholder “may contact the Service Center to request a check for the
 13 remaining balance” (*Hamilton* FAC, Ex. 5. § 16); and (3) a related provision in
 14 Section 16 governing cardholder-initiated closures, which similarly states that
 15 the cardholder may request a check for the remaining balance. (*Hamilton* FAC ¶¶
 16 124-125; Ex. 5 § 16.)

17 Here, the Court agrees with BANA. First, the Zero Liability Policy’s plain
 18 language does not apply to these allegations that BANA failed to release funds in
 19 the accounts as required by the Account Agreement. The Zero Liability Policy
 20 applies to unauthorized transactions, not “Remainder Funds.” Second, no
 21 *Hamilton* Plaintiff alleges that they closed their accounts, so the provision of
 22 Section 16 pertaining to cardholder-initiated closures does not apply. Third, the
 23 provision governing BANA-initiated closures requires that account holders
 24 “contact the Service Center to request a check for the remaining balance” to
 25 release the funds. No Plaintiff plausibly alleges this required communication.
 26 Thus, all claims brought by *Hamilton* Plaintiffs under the Remainder Funds
 27 theory are dismissed for failure to plausibly allege breach, with leave to amend.

28 The *Yip* Plaintiffs also bring breach of contract claims. Their allegations are

1 based on three theories: (1) that BANA failed to timely investigate, resolve, and
 2 reimburse Plaintiffs for allegedly unauthorized transactions; (2) that BANA froze
 3 or blocked their accounts; and (3) that BANA failed to make funds available to
 4 them as instructed by DETR. (*Yip* FAC ¶¶335(a)-(h).)

5 The first theory relies on Sections 9 and 11 of the Account Agreement, like
 6 the *Hamilton* Plaintiffs claim under the Zero Liability Policy. The Court therefore
 7 adopts the standards and reasoning applied to the *Hamilton* Plaintiffs and applies
 8 it to the *Yip* Plaintiffs. All *Yip* Plaintiffs' claims for breach of Sections 9 and 11 of
 9 the Account Agreement that suffer the same deficiencies as the *Hamilton* Plaintiffs
 10 are dismissed with leave to amend.

11 The second theory is based on the plain language of the Account
 12 Agreement. Section 2 of the Account Agreement permits BANA to freeze an EDD
 13 Cardholder's account if it "suspect[s] irregular, unauthorized, or unlawful
 14 activities involved" in the account. (*Hamilton* FAC, Ex. 5 § 2.) Section 2 allows a
 15 freeze to continue until the end of its investigations into its suspicions. (*Id.*) Under
 16 the Account Agreement, BANA is afforded wide latitude to freeze accounts. Thus,
 17 the *Yip* Plaintiffs who have failed to allege that BANA lacked requisite suspicion
 18 when freezing accounts or have failed to allege that BANA did not lift an account
 19 freeze after completing the investigation are dismissed with leave to amend.

20 The third theory also relies on Section 2 of the Account Agreement, which
 21 states that BANA will make funds available when instructed by DETR. (*Hamilton*
 22 FAC, Ex. 5 § 2.) Plaintiffs allege BANA breached Section 2 by failing to make funds
 23 available when instructed by DETR by freezing Plaintiffs' access to their accounts.
 24 But in addition to Section 2's funding language, the Account Agreement also
 25 contains numerous provisions that allow BANA to restrict access to accounts,
 26 including the freeze provision in Section 2. (*Hamilton* FAC, Ex. 5 § 2.) Plaintiff's
 27 interpretation would give these provisions no effect. Thus, the court dismisses
 28 the claim for breach under this theory with prejudice and without leave to amend.

3. Unjust Enrichment and Money Had and Received

Both the *Yip* and *Hamilton* Plaintiffs bring a claim for unjust enrichment and money had and received. Under Nevada law, a plaintiff has a valid claim for unjust enrichment when (1) “the plaintiff confers a benefit on the defendant”; (2) “the defendant appreciates such benefit”; and (3) “there is acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof.” *Certified Fire Prot. Inc. v. Precision Constr.*, 283 P.3d 250, 257 (Nev. 2012) (internal quotation marks omitted).

This cause of action, though, “is not available when there is an express, written contract” between the parties. *Leasepartners Corp. v. Robert L. Brooks Trust Dated November 12, 1975*, 942 P.2d 182, 187 (Nev. 1997). Here, neither party disputes that the Account Agreement is an express, written, valid contract between all Plaintiffs and BANA. Plaintiffs express concern that the Account Agreement could be read to allow BANA to retain funds paid by DETR to BANA on Plaintiffs’ behalf. While the Account Agreement does allow BANA to freeze accounts, (*Hamilton* FAC, Ex. 5 § 2), Section 2 only allows a freeze to continue until the end of its investigations into its suspicions (*Id.*). Moreover, Section 11 requires BANA to investigate. (*Id.* at § 11.) Thus, there is no risk that the provisions of the contract allow BANA to unjustly enrich itself with DETR benefits intended for Plaintiffs.

Thus, because a written, express, valid contract exists between Plaintiffs and BANA, the claim for unjust enrichment and money had and received is dismissed with prejudice and without leave to amend as to both the *Yip* and *Hamilton* Plaintiffs.

4. Violations of the Nevada Deceptive Trade Practices Act

Finally, both the *Yip* and *Hamilton* Plaintiffs allege that BANA violated the Nevada Deceptive Trade Practices Act (“NDTPA”). Under Nevada law, “[a]n action

1 may be brought by any person who is a victim of consumer fraud.” NRS 41.600(1).
 2 Consumer fraud is defined in the statute as, among other things, a “deceptive
 3 trade practice as defined in NRS 598.0915 to 598.0925, inclusive.” NRS
 4 41.600(2)(e). A person engages in a “deceptive trade practice” when in the course
 5 of his or her business or occupation “he or she knowingly: . . . (c) Violates a state
 6 or federal statute or regulation relating to the sale or lease of goods or
 7 services. . . . (e) Uses an unconscionable practice in a transaction.” NRS
 8 598.0923(1). Plaintiffs allege that BANA has engaged in a deceptive trade practice
 9 under provision (c) by violating EFTA and Reg E and provision (e) by using
 10 unconscionable practices.

11 BANA contends that the EFTA and Reg E do not relate “to the sale or lease
 12 of goods or services,” so Plaintiffs’ claim under NRS 598.0923(1)(c) necessarily
 13 fails. BANA also argues that Plaintiffs fail to plausibly allege that BANA’s alleged
 14 practices are unconscionable within the meaning of the DTPA. The Court
 15 disagrees with BANA on both fronts.

16 First, “the NDTPA is a remedial statutory scheme.” *Poole v. Nevada Auto*
 17 *Dealership Invs., LLC*, 449 P.3d 479, 485 (Nev. App. 2019). Such statutes are
 18 afforded a “liberal construction.” *R.J. Reynolds Tobacco Co. v. Eighth Jud. Dist.*
 19 *Ct. in & for Cnty. of Clark*, 514 P.3d 425, 430 (Nev. 2022). With this framing, the
 20 Court finds it appropriate to consider the EFTA and Reg E as laws that relate to
 21 the sale or lease of goods or services. Here, BANA contracted with DETR to provide
 22 a service to Plaintiffs. Those services are regulated by the EFTA and Reg E. Thus,
 23 violation of the EFTA and Reg E is a sufficient basis for a claim under the NDTPA.
 24 And, as outlined above, some Plaintiffs have plausibly alleged violations of the
 25 EFTA and Reg E. Thus, the Court denies BANA’s Motion to Dismiss the *Yip* and
 26 *Hamilton* Plaintiffs’ claims for violation of the NDTPA under NRS 598.0923(1)(c).

27 The Court also finds that Plaintiffs’ have plausibly alleged that BANA used
 28 unconscionable practices. The statute defines “unconscionable practice” as a

1 practice that, to the detriment of a consumer: “(1) Takes advantage of the lack of
 2 knowledge, ability, experience or capacity of the consumer to a grossly unfair
 3 degree;” “(2) Results in a gross disparity between the value received and the
 4 consideration paid, in a transaction involving transfer of consideration;” or “(3)
 5 Arbitrarily or unfairly excludes the access of a consumer to a good or service.”
 6 NRS 598.0923(2)(b)(2).

7 Both sets of Plaintiffs allege specific practices that are allegedly
 8 unconscionable: (1) failure to adequately protect the funds placed on recipients’
 9 debit cards; (2) failure to properly respond to claims of fraud made by benefit
 10 recipients; and (3) retaining cardholders’ funds despite knowledge that the funds
 11 belong to the cardholders. (*Hamilton* FAC ¶¶ 153-58; *Yip* FAC ¶¶ 317-22.) Taking
 12 these allegations as true, they are sufficient to state a claim for unconscionable
 13 practices under the NDTPA. The Court therefore denies BANA’s Motion to Dismiss
 14 both the *Yip* and *Hamilton* Plaintiffs’ claims for violation of the NDTPA under NRS
 15 598.0923(1)(e).¹

16 **B. The Claims Only Brought by the *Yip* Plaintiffs**

17 **1. State and Federal Due Process Violations**

18 The *Yip* Plaintiffs allege due process violations by BANA pursuant to the
 19 Fourteenth Amendment of the U.S. Constitution and pursuant to the Nevada
 20 Constitution. Specifically, they allege that by freezing Plaintiffs’ accounts without
 21 any pre-deprivation hearing, they were deprived of a protected property interest
 22 in DETR benefits.

23 A plaintiff seeking relief under 42 U.S.C. § 1983 for violation of the United
 24 States Constitution must show that she was “deprived of a right secured by the
 25 Constitution or laws of the United States,” and that “the alleged deprivation was

26
 27 ¹ To the extent the *Yip* Plaintiffs may argue that their FAC alleges other violations of the
 28 NDTPA not included in the *Hamilton* FAC, the *Yip* Plaintiffs waived their arguments
 against dismissal of those claims. (ECF No. 45 at 21.)

1 committed under color of state law.” *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S.
 2 40, 49-50 (1999). When analyzing the due process clause in the Nevada
 3 constitution, “the similarities between the due process clauses contained in the
 4 United States and Nevada Constitutions . . . permit us to look to federal precedent
 5 for guidance.” *Hernandez v. Bennett-Haron*, 287 P.3d 305, 310 (Nev. 2012).

6 BANA contends that Plaintiffs have not alleged that BANA was a state actor
 7 when it froze their accounts, nor have they alleged that due process requires
 8 notice and a pre-deprivation hearing under these circumstances. The Court
 9 disagrees.

10 The *Yip* Plaintiffs allege that BANA is a state actor and acted under color of
 11 state law because “it is engaged in a joint undertaking with the State to provide
 12 and administer UI and other DETR benefits under a mutually beneficial
 13 relationship and because it performs a function that is both traditionally and
 14 exclusively governmental.” (*Yip* FAC ¶ 307.) Either theory is sufficient to satisfy
 15 the state action requirement. *See Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir.
 16 2003) (“Satisfaction of any one test [of the four used in the Ninth Circuit] is
 17 sufficient to find state action.”). “Under the public function test, when private
 18 individuals or groups are endowed by the State with powers or functions
 19 governmental in nature, they become agencies or instrumentalities of the State
 20 and subject to its constitutional limitations.” *Id.* (quoting *Lee v. Katz*, 276 F.3d
 21 550, 554-55 (9th Cir. 2002)). “The public function test is satisfied only on a
 22 showing that the function at issue is both traditionally and exclusively
 23 governmental.” *Id.* (internal quotation marks omitted).

24 Accepting all allegations as true, the *Yip* FAC plausibly alleges that BANA
 25 is responsible for the administration and distribution of Nevada’s DETR benefits.
 26 The Court is also satisfied that the role BANA has taken on in administering the
 27 distribution of Nevada’s DETR benefits is traditionally and exclusively
 28 governmental. Specifically, the *Yip* Plaintiffs allege that BANA entered into an

1 exclusive contract with DETR in 2016 to distribute all DETR benefits. Because
 2 BANA-provided debit cards were held out as the exclusive means of receiving
 3 DETR benefits, the *Yip* FAC plausibly alleges that BANA was acting in a
 4 traditionally and exclusively governmental role.

5 The Court holds the *Yip* FAC plausibly alleges that BANA's role in
 6 administering the distribution of DETR benefits is a function that is "both
 7 traditionally and exclusively governmental." *Kirtley*, 326 F.3d at 1093. Because
 8 the Court holds that the allegations in the FAC satisfy the public function test, it
 9 need not consider whether the FAC alleges sufficient facts to satisfy the joint
 10 action test. *See id.* at 1092.

11 To state a claim for a procedural due process violation, the complaint must
 12 allege "two distinct elements: (1) a deprivation of a constitutionally protected
 13 liberty or property interest, and (2) a denial of adequate procedural
 14 protections." *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971,
 15 982 (9th Cir. 1998). Plaintiffs have a constitutionally protected property interest
 16 in the DETR benefits for which they were approved. *See Goldberg v. Kelly*, 397
 17 U.S. 254, 262 (1970) (holding the procedural due process protections attach to
 18 the "withdrawal of public assistance benefits" and "disqualification for
 19 unemployment compensation").

20 To determine whether procedural protections are adequate, the Ninth
 21 Circuit applies the three-part balancing test established in *Mathews v. Eldridge*,
 22 424 U.S. 319 (1976). *See, e.g., Franceschi v. Yee*, 887 F.3d 927, 936–37 (9th Cir.
 23 2018) (applying the *Mathews* test). "Under *Mathews* we consider (1) 'the private
 24 interest that will be affected by the official action'; (2) 'the risk of an erroneous
 25 deprivation of such interest through the procedure used, and the probable value,
 26 if any, of additional or substitute procedural safeguards'; and (3) the
 27 government's interest in minimizing the cost and burden of additional or
 28 substitute procedures." *Id.* (quoting *Mathews*, 424 U.S. at 335).

1 Applying the *Mathews* factors, the *Yip* Plaintiffs plausibly allege that
 2 BANA's accounting freezing procedures failed to comply with the requirements of
 3 due process. First, Plaintiffs have a protected property interest in the DETR
 4 benefits they were eligible to receive and did receive. *See Goldberg v. Kelly*, 397
 5 U.S. 254, 262 (1970). Second, the *Yip* FAC plausibly alleges that the risk the
 6 challenged account freezing procedure will result in erroneous deprivation of
 7 protected interests is high. Plaintiffs' allegations include allegations that
 8 accounts were frozen without notice and that they were frozen erroneously. Third,
 9 BANA has a strong interest in preventing fraud. But that interest does not, at this
 10 point in the litigation, overcome the other *Mathews* factors. Thus, the Court finds
 11 that the *Yip* Plaintiffs have plausibly alleged due process violations under the
 12 Fourteenth Amendment of the U.S. Constitution and the Nevada Constitution.
 13 BANA's Motion to Dismiss these claims is therefore denied.

14 **2. Negligence and Negligence Per Se**

15 Plaintiffs allege that BANA was negligent in failing to (1) issue chip cards
 16 and "protect" Plaintiffs from fraud; (2) provide "effective" customer service; and
 17 (3) adequately investigate and provisionally credit their claims of unauthorized
 18 transactions. (*Yip* FAC ¶ 325.) BANA contends that these claims fail for four
 19 reasons. First, BANA argues that the claim is barred by the economic loss
 20 doctrine. Second, BANA argues that it was under no tort duty of care. Third,
 21 BANA argues that Plaintiffs' fail to allege causation. Fourth, BANA says that
 22 Plaintiffs cannot rely on theory of negligence per se based on alleged violations of
 23 the NDTPA or the Gramm-Leach-Bliley Act ("GLBA").

24 "[T]he economic loss doctrine cuts off tort liability when no personal injury
 25 or property damage occurred, with traditionally recognized exceptions for certain
 26 classes of claims." *Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 206
 27 P.3d 81, 90 (Nev. 2009). "[C]ourts have made exceptions to allow such recovery
 28 in certain categories of cases, such as negligent misrepresentation and

1 professional negligence actions against attorneys, accountants, real estate
 2 professionals, and insurance brokers.” *Id.* at 75. “[E]xceptions to the economic
 3 loss doctrine exist in broad categories of cases in which the policy concerns about
 4 administrative costs and a disproportionate balance between liability and fault
 5 are insignificant, or other countervailing considerations weigh in favor of
 6 liability.” *Id.* at 76. These exceptions do not apply in this case.

7 Plaintiffs argue that they have suffered non-economic injuries due to
 8 BANA’s failure to protect them from fraudulent activity. Specifically, Plaintiffs
 9 allege that their account and personal information was obtained by unknown
 10 third parties and used for unauthorized transactions, forcing them to spend
 11 significant time responding to the breach. But “the loss of money through
 12 fraudulent transactions and time due to responding to the breach are purely
 13 economic injuries.” *In re Bank of Am. California Unemployment Benefits Litig.*, 674
 14 F. Supp. 3d at 921. Because no exception to the economic loss doctrine applies,
 15 and because Plaintiffs have failed to allege that they suffered cognizable non-
 16 economic injuries, BANA’s Motion to Dismiss Plaintiffs’ negligence claims under
 17 the economic loss doctrine is granted, with leave to amend.

18 Finally, Plaintiffs have plausibly alleged negligence per se based on alleged
 19 violations of the NDTPA. As outlined above, Plaintiffs have set forth sufficiently
 20 plausible allegations that BANA violated the NDTPA. To prevail under a
 21 negligence per se claim, a plaintiff must prove that (1) he or she belongs to a class
 22 of persons that a statute is intended to protect, (2) the plaintiff’s injuries are the
 23 type the statute is intended to prevent, (3) the defendant violated the statute, (4)
 24 the violation was the legal cause of the plaintiff’s injury, and (5) the plaintiff
 25 suffered damages. *Anderson v. Baltrusaitis*, 944 P.2d 797, 799 (Nev. 1997). Here,
 26 the NDTPA exists to protect “any person who is a victim of consumer fraud.” NRS
 27 41.600(1). Plaintiffs’ alleged injuries are injuries allegedly caused by consumer
 28 fraud, as defined in the statute. As outlined above, Plaintiffs have plausibly

1 alleged that BANA violated the statute. The Court is satisfied with Plaintiffs' 2 causation and damages allegations. But despite these allegations, the economic 3 loss doctrine blocks Plaintiffs' ability to recover under this theory. BANA's Motion 4 to Dismiss this claim is granted, with leave to amend.

5 **3. Breach of Implied Covenant of Good Faith and Fair Dealing**

6 The *Yip* Plaintiffs allege a cause of action based on a breach of the implied 7 covenant of good faith and fair dealing.

8 “[T]he implied covenant of good faith and fair dealing . . . is part of every 9 contract.” *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 808 P.2d 919, 922 (Nev. 10 1991). “When one party performs a contract in a manner that is unfaithful to the 11 purpose of the contract and the justified expectations of the other party are thus 12 denied, damages may be awarded against the party who does not act in good 13 faith.” *Id.* at 923. A party sufficiently alleges an implied covenant claim by 14 identifying the contract that is the basis for the claim, identifying the conduct 15 that constitutes breach of the covenant, and alleging that the breach caused the 16 party damage. *Morris v. Bank of America Nevada*, 886 P.2d 454, 457 (Nev. 1994). 17 Good faith is a question of fact. *Consol. Generator-Nevada, Inc. v. Cummins Engine* 18 *Co.*, 971 P.2d 1251, 1256 (Nev. 1998) (citing *Mitchell v. Bailey & Selover, Inc.*, 605 19 P.2d 1138, 1139 (Nev. 1980)).

20 The *Yip* Plaintiffs have pled the elements of the breach of the covenant of 21 good faith and fair dealing. First, the *Yip* Plaintiffs identify the contract as the 22 Cardholder Agreement. (*Yip* FAC ¶ 346.) Second, they identify the following 23 conduct as BANA's breach of the covenant: failing to issue chip cards; failing to 24 secure card, account, and personal information; failing to adequately monitor for 25 fraudulent transactions; failing to “increase its efforts” in light of rise in number 26 of DETR cardholders and the rise of fraud related to the pandemic; failing to 27 ensure effective customer service; failing to warn of fraudulent use; failing to 28 adequately process and investigate Plaintiffs' claims; failing to extend provisional

1 credit to Plaintiffs suffering delays in their fraud claims; and freezing accounts
 2 without a way for Plaintiffs to contest the action. (*Id.* ¶ 347.) Third, they allege
 3 damages arising out of the breach. (*Id.* ¶ 348.)

4 Defendants argue that the implied covenant of good faith and fair dealing
 5 cannot impose new obligations that extend beyond or contradict the agreement.
 6 But Nevada's implied covenant of good faith and fair dealing permits use of the
 7 covenant to find breach beyond the literal terms of the contract. *See J.A. Jones*
 8 *Const. Co. v. Lehrer McGovern Bovis, Inc.*, 89 P.3d 1009, 1016 (Nev. 2004) (citing
 9 *Hilton Hotels*, 808 P.2d at 922–23).

10 Defendants then argue that Plaintiffs may not bring an implied covenant
 11 claim based on the same allegations underlying their express contract claim. A
 12 plaintiff "may plead both breach of contract and breach of the implied covenant
 13 of good faith and fair dealing as alternative theories of liability." *See Ruggieri v.*
 14 *Hartford Ins. Co. of the Midwest*, 2013 WL 2896967, at *3 (D. Nev. 2013).
 15 "Pleadings must be construed so as to do justice." Fed. R. Civ. P. 8(e). Although
 16 Plaintiffs do not explicitly plead in the alternative, they have sufficiently pled the
 17 elements for breach of the implied covenant of good faith and fair dealing.

18 Finally, Defendants argue that the terms of the implied covenant of good
 19 faith and fair dealing alleged by Plaintiffs are too vague and fail to provide
 20 workable standards. "Whether the controlling party's actions fall outside the
 21 reasonable expectations of the dependent party is determined by the various
 22 factors and special circumstances that shape these expectations." *Hilton Hotels*,
 23 808 P. 2d, at 923–24. Good faith is a question of fact. *Consol. Generator-Nevada,*
 24 *Inc.*, 971 P.2d at 1256. Whether Plaintiffs can establish sufficient facts to show a
 25 Defendant's lack of good faith is a question to be addressed later in proceedings.

26 The Court therefore denies BANA's Motion to Dismiss Yip Plaintiffs' claims
 27 for breach of the implied covenant of good faith and fair dealing.

28 **4. Breach of Implied Contract**

1 The *Yip* Plaintiffs allege a cause of action based on an implied contract. The
 2 Court need not address these arguments in detail. “[A]n action does not lie on an
 3 implied contract where there exists between the parties an express contract
 4 covering the same subject matter.” *Rockstar, Inc. v. Original Good Brand Corp.*,
 5 No. 09-CV-1499, 2010 WL 3154120, at *6 (D. Nev. 2010) (quoting *Ewing v.*
 6 *Sargent*, 482 P.2d 819, 823 (Nev. 1971). Because the Court found that the
 7 Account Agreement is an express, written, valid agreement covering all conduct
 8 alleged in the *Yip* FAC, there can be no action for breach based on an implied
 9 contract. The Court therefore dismissed this claim with prejudice and without
 10 leave to amend.

11 **5. Breach of Fiduciary Duty**

12 The *Yip* Plaintiffs do not oppose dismissal of their claims of a breach of
 13 fiduciary duty. (ECF No. 45 at 22, n.4.) The Court therefore dismisses those
 14 claims without prejudice. “[A]n action does not lie on an implied contract where
 15 there exists between the parties an express contract covering the same subject
 16 matter.” *Rockstar, Inc.*, 2010 WL 3154120, at *6 (D. Nev. 2010); *see also*
 17 *Leasepartners*, 942 P.2d at 187.

18 **6. Breach of Contract and Breach of Implied Covenant of Good
 19 Faith and Fair Dealing (Third-Party Beneficiaries)**

20 The *Yip* Plaintiffs’ bring a claim for breach of contract and breach of implied
 21 covenant good faith and fair dealing claims based on the agreement between
 22 BANA and DETR, arguing that they are third-party beneficiaries of that contract.
 23 A party seeking to enforce a contract as a third-party beneficiary must plead a
 24 contract with a “clear[] . . . promissory intent to benefit the third party.” *Rose,*
 25 *LLC v. Treasure Island, LLC*, 135 Nev. 145, 155 (Nev. App. 2019); *see Lipshie v.*
 26 *Tracy Inv. Co.*, 93 Nev. 370, 380 (1977) (“[T]here must be an intent clearly
 27 manifested by the promisor to secure the benefit claimed to the third party.”).
 28 “[T]he language of the contract must show a clear intent to rebut the presumption

1 that the [third parties] are merely incidental beneficiaries." *Orff v. United States*,
2 358 F.3d 1137, 1145 (9th Cir. 2004) (internal quotation marks omitted).

3 Plaintiffs have failed to make plausible allegations that they are intended
4 beneficiaries of the contract between BANA and DETR. Plaintiff simply argues
5 that the question of whether a third-party is an intended beneficiary is a question
6 of fact. To survive a motion brought under Fed. R. Civ. P. 12(b)(6), Plaintiffs must
7 point to specific factual allegations that, if taken as true, would make out a claim
8 as a third-party beneficiary of the contract between BANA and DETR. Thus, the
9 Court will grant BANA's Motion to Dismiss these claims, with leave to amend.

10 **III. CONCLUSION**

11 IT IS THEREFORE ORDERED that BANA's motions to dismiss in each case
12 are GRANTED IN PART and DENIED IN PART consistent with this Order. (*Yip*
13 ECF No. 44; *Hamilton* ECF No. 22.)

14 IT IS FURTHER ORDERED that the *Yip* Plaintiffs' Motion for Leave to File
15 Document, (*Yip* ECF No. 44), is GRANTED.

16 Consistent with this Order, the *Yip* Plaintiffs are directed to file an Amended
17 Complaint or a Status Report with the Court within 30 days of the date of this
18 Order.

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20 DATED THIS 9th day of August 2024.

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24 ANNE R. TRAUM
25 UNITED STATES DISTRICT JUDGE
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